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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 793

JOSEPH F. MAGGIO,

Petitioner,

vs.

RAYMOND ZEITZ, AS TRUSTEE IN BANKRUPTCY OF LUMA CAMERA SERVICE, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SAMUEL C. DUBERSTEIN,
MAX SCHWARTZ,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Joseph F. Maggio respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review the decree of that Court filed November 13th, 1944 (R. 126), affirming the order of the District Court of the United States for the Southern District of New York, dated the 28th day of December, 1943 (R. 119-120). The order of the District Court affirmed the order of the Referee in Bankruptcy dated August 9th, 1943 (R. 107-108).

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit (per curiam) appears in the record at pg. 125, and has not yet been officially reported.

The opinion of the District Court is found in the record at pgs. 111-118 and has not as yet been officially reported.

The opinion of the Referee appears at pgs. 101-103 of the record and is not officially reported.

Jurisdiction

The decree of the Circuit Court of Appeals for the Second Circuit sought to be reviewed, was filed on November 13th, 1944 (R. 126).

The jurisdiction of this Court is invoked under Section 24(c) of the Bankruptcy Act, as amended by the Act of June 22nd, 1938, C. 575, Sec. 1, 52 Stat. 854, 11 U. S. C. A., Sec. 47(a), and Sec. 240(a) of the Judicial Code as amended by the Act of February 13th, 1925, Chapter 229, Sec. 1, 438 Stat. 938, 28 U. S. C. A. Sec. 347(a).

Summary Statement of Matters Involved

Joseph F. Maggio (hereinafter referred to as the Petitioner) was the President of Luma Camera Service, Inc.

On April 14th, 1942 an involuntary petition in bankruptcy was filed against Luma Camera Service Inc. in the office of the Clerk of the United States District Court for the Southern District of New York, upon which an order of adjudication was entered on April 23rd, 1942.

Prior thereto and on December 30th, 1941, Luma Camera Service, Inc. made a general assignment for the benefit of creditors, on which date it ceased to conduct business.

On June 1st, 1942 Raymond Zeitz was appointed trustee in bankruptcy.

On January 18th, 1943 the trustee procured an order to show cause upon his verified petition seeking to direct the petitioner to turn over and surrender merchandise of the value of $34,781.97.

An answer was filed by the petitioner, verified May 17th, 1943.

Hearings were had upon the issues before the Referee on May 18th and June 4th, 1943.

The trustee based his entire proceeding upon mathematical computations and not upon evidence of any actual concealment by the petitioner.

The trustee's proof consisted of an inventory figure appearing in the books of the bankrupt as of January 1st, 1940 —which said figure likewise appeared in a financial statement issued by the bankrupt as of December 1st, 1940 and signed by the petitioner.

The trustee using this inventory figure as of January 1st, 1941, to wit; $30,889.95, knew that the petitioner could only deny the correctness of this figure at the risk of admitting the issuance of a false financial statement and inviting a criminal proceeding against himself. Faced with this dilemma, the petitioner admitted that the inventory figure was true and correct.

Proceeding from this inventory figure of $30,889.95, the trustee added the purchases during the year 1941 amounting to $101,998.62 and subtracted therefrom the total sales during the same period in the sum of $113,736.29, leaving a balance to be accounted for of $19,152.28. After crediting the bankrupt and petitioner with a final inventory at cost of $1652.28, there remained a merchandise shortage not accounted for in the sum of $17,500.00.

The figures with respect to purchases, sales, and payments to creditors, are not in dispute. There is no controversy as to the facts. The problem presented to the Referee, District Court, and Circuit Court was merely the legal conclusion to be drawn from the undisputed facts.

The trustee's proof consisted merely of the entries in the bankrupt's books and records, as well as the data compiled

by the trustee's accountant with respect to purchases, sales and payments made by the bankrupt during the months of November and December 1941.

This proof showed a book shortage in merchandise, but no proof was submitted by the trustee that the petitioner actually had the merchandise or its proceeds in his possession or control at the time of (1) the filing of the involuntary petition in bankruptcy; (2) the institution of the turnover proceeding, or (3) the date of the entry of the turnover order by the Referee. Nor was any proof submitted by the trustee with respect to the petitioner's ability to comply with any turnover order to be entered against him at any of the aforementioned periods.

The only proof on the question of the ability of the petitioner to comply with the turnover order, is his testimony that he was working at a defense job (R. 99).

The bankrupt's purchases for the year 1941 amounted to $101,998.62, while its sales during the same period amounted to $113,726.39 or an excess of sales over purchases of approximately $12,000.00.

As was found by the District Court, the bankrupt's purchases for November and December 1941 amounted to $1259.91, while its sales during this period amounted to $2928.36 and payments to creditors amounted to $4700.00 (R. 115). This excess of sales could only have come out of the inventory on hand on January 1st, 1941.

As the current sales exceeded current purchases, the merchandise for which an accounting was sought could only be represented by the inventory alleged to have been on hand on January 1st, 1941.

There is no proof in the record as to the possession on the part of the petitioner of the missing merchandise at any time other than the inference or presumption to be drawn from the entry of said figure in the bankrupt's books and

the financial statement issued by it as of December 31st, 1940.

Had the Referee and the Courts below taken a realistic attitude instead of invoking the doctrine of "presumption of possession", it would have been apparent to them from the proof, as to which there is no conflict, that the bankrupt never had an inventory of $30,889.95 on January 1st, 1941.

The history of the bankrupt's operations and its inventory record as shown by the testimony of the accounts and the books of the bankrupt, was as follows:

1/1/36	$14,444.65	(Rec. 40)
1/1/37	14,997.24	(Rec. 42)
1/1/38	17,410.10	(Rec. 43)
1/1/39	18,880.09	(Rec. 43)
1/1/40	20,250.24	(Rec. 44)

In the light of these records, it is obvious that the bankrupt did not have an actual inventory on hand on January 1st, 1941 of $30,889.95. There is no proof in the record as to what the actual physical inventory was on January 1st, 1941. As to when the merchandise claimed to be unaccounted for was last in the possession of the bankrupt or the petitioner, or when it was removed or converted into cash, the record is silent and no proof thereon was submitted by the trustee.

Testimony was introduced on behalf of the petitioner that he never removed any property from the bankrupt, that he had not withdrawn any monies except in the regular course of business, in fact that he had loaned monies to the bankrupt immediately before it ceased the conduct of business, and that he did not have the means of complying with any turnover order to be entered against him, and further that he did not have either at the time of the filing of the petition or any time during the turnover proceedings, any portion of the sum of $17,500.00.

The Referee adopted the trustee's theory of a presumption of continued possession and without actual proof of present possession and ability to comply with a turnover, rendered a decision directing the petition to turnover the sum of $17,500.00. An order in conformity with this decision was entered on August 9th, 1943.

A petition to review the said order of the Referee was filed by petitioner (R. 109-110).

The Referee's order was affirmed by order of the District Court on December 28th, 1943 (R. 119-120).

A notice of appeal was filed in the Circuit Court of Appeals for the Second Circuit (R. 121).

The Circuit Court of Appeals rendered a per curium decision affirming the order of the District Court.

Questions Presented

1. Is the doctrine of "presumption of continued possession" applicable in the granting of a turnover order?

2. Does a trustee have to prove present ability to comply on the part of the respondent?

Specification of Errors

The Circuit Court of appeals erred

1. In holding that the doctrine of "presumption of continued possession" was applicable.

2. In holding that the trustee did not have to establish and prove present ability on the part of a respondent in a turnover proceeding to comply with a turnover order.

3. In holding that the trustee might rely upon a "presumption of continued possession" over a period of almost 3½ years in the case of a theoretical withholding of property.

4. In holding that the trustee was not required to prove present ability to comply on the part of petitioner herein that any turnover order that might be entered against him, or how much of the property sought to be recovered still remained in the possession of the petitioner, as an issue separate and apart from the turnover proceeding itself where almost 3½ years elapsed between the date when the property was claimed to be in the possession of the petitioner and the turnover order by the Referee on August 9th, 1943.

Reasons Relied On for the Allowance of the Writ

The lower Court erred as a matter of law in relying upon a presumption rather than upon clear and convincing proof, in finding that a theoretical concealment of property existed.

The Courts below erred as a matter of law in failing to hold that the trustee was required to submit affirmative proof that the petitioner had in his possession and under his control on the date of the filing of the petition in bankruptcy, to wit, April 14th, 1942, as well as on May 18th 1943, the date of the first hearing on the turnover proceedings, merchandise valued at $17,500.00 or the equivalent in cash.

The Courts below erred as a matter of law in relying upon the presumption of continued possession in spite of the record and testimony offered to refute any theoretical concealment of property and to refute the presumption that the petitioner continued to have any property in his possession or under his control.

The decisions of *Danish* v. *Sofranski*, 93 F. (2d) 424; *In re Schoenberg*, 70 F. (2d) 321; *In re Pinsky-Lapin & Co.*, 98 F. (2d) 776; *Seligson* v. *Goldsmith*, 128 F. (2d) 977; *Robbins* v. *Gottbetter*, 134 F. (2d) 843; *Cohen* v. *Jeskowitz*, 144 F. (2d) 39, all decided by the Circuit Court

of Appeals for the Second Circuit, and involving the question of when a trustee may rely upon a presumption of continued possession, as in the case at bar, are conflicting in doctrines of law.

The recent decisions of the Circuit Court of Appeals, for the Second Circuit, in substance suggest that the doctrine of presumption of continued possession, which they feel constrained to follow, constitutes an abuse of process of the Bankruptcy Court, and that the Supreme Court of the United States should consider and determine the question and overrule the precedent that fashions upon the Circuit Court an irrational rule of presumption, obviously contrary to fact.

The Court has further stated that if the matter were before it as *res integra*, it would reverse the turnover order and would not invoke the doctrine of presumption of continued possession and that the Supreme Court has never committed itself to the presumption.

The recent decisions of the Circuit Court of Appeals in which they rely upon a presumption of continued possession, are in conflict with the decisions of the Circuit Court of Appeals of the Seventh Circuit, in *In re J. L. Marks*, 85 F. (2d) 392; the decision of the Circuit Court of Appeals for the Fifth Circuit, in *In re Samuel* v. *Dodd*, 142 F. 68; the decisions of the Circuit Court of Appeals for the Eighth Circuit, in *Marrin* v. *Ellis*, 15 F. (2d) 321; the decisions of the Courts in the Fourth Circuit—*In re Fraidin*, 55 F. Supp. 129; the decision of the Circuit Court of Appeals for the First Circuit in *In re Goldman*, 52 F. (2d) 421—and the decisions of the Courts in the Third Circuit—*In re Tabak* (D. C. E. D. Pa.), 34 F. (2d) 209, and in *In re Zappala* (E. D. Pa.) 44 F. Supp. 353.

The Referee and the District Court erred in making an order which operates in personam, by requiring petitioner to do the thing commanded upon pain of punishment by

imprisonment for refusal, without having required the Trustee to affirmatively prove, particularly in view of the lapse of more than three years, that the petitioner had the money in his possession or under his control at the time of the order and the power to comply with its requirements.

The questions involved should be settled by this Court, so that there may be a unanimity of opinion throughout the courts of the United States.

The questions involved should be settled by this Court because the Circuit Court has expresesd an opinion that the application of the doctrine of continued presumption of possession constitutes an abuse of process of the Bankruptcy Court, which should be overruled as it fastens upon the Court an irrational rule of presumption contrary to fact.

The question involved should be settled by this Court because the Justices for the Circuit Court of Appeals for the Second Circuit have expressed the desirability of the determination of this question by the Supreme Court of the United States, particularly as this Court has never committed itself to the presumption, and by reason of the conflict of decisions in the various circuits.

Argument

Point A

THERE IS A CONFLICT OF AUTHORITY WITHIN THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT ON THE QUESTION OF WHEN A TRUSTEE MAY RELY ON A PRESUMPTION OF CONTINUED POSSESSION RESULTING IN THE SUGGESTION BY THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, IN ITS RECENT DECISIONS, THAT THIS QUESTION BE REVIEWED AND FINALLY DETERMINED BY THE SUPREME COURT OF THE UNITED STATES.

One of the determining issues in the case at bar is whether the trustee should have been permitted to rely upon the

presumption of continued possession for a period of more than three years under the circumstances of the case.

Here the petitioner was caught on the twin horns of a dilemma. The trustee sought a turnover order based upon an inventory figure appearing in the bankrupt's books, which was reflected in the financial statement issued by the bankrupt and signed by the appellant as of December 31st, 1940. The trustee using this inventory figure as of January 1st, 1941, to wit, $30,889.95 founded his turnover application thereon, knowing that the petitioner could not deny the correctness of this figure at the risk of admitting the issuance of false financial statement and inviting a criminal proceeding against himself.

The trustee's proof consisted merely of the entries in the bankrupt's books and records, as well as the data compiled by the trustee's accountant with respect to purchases, sales and payments made by the bankrupt during the months of November and December 1941.

There is no proof in the record as to the actual possession on the part of the petitioner of the missing merchandise, either at the time of the close of business on December 30th, 1941, the date of the filing of the involuntary petition, April 14th, 1942, or at the time of the hearing on the turnover motion in May and June 1943, nor was there any proof offered by the trustee as to the petitioner's ability to comply with any turnover order, and the defense of the petitioner was that he was unable to comply with any turnover order.

Had the Referee and the District Court taken a realistic attitude based upon the actual fact instead of invoking the doctrine of "presumption of possession", it would have been apparent to them from the bankrupt's books and records and the testimony of the accountants, as to which there is no conflict, that the bankrupt never had an inventory of $30,889.95 on January 1st, 1941.

The history of the bankrupt's operations and inventory record is set forth in the statement of facts, and it is obvious in the light of these records that the bankrupt never had an actual inventory on hand on January 1st, 1941 of $30,889.95.

As to when the merchandise claimed to be unaccounted for by the trustee was last in the possession of the petitioner, or was removed or concealed by him, or converted into cash, the record is absolutely silent and no proof thereon was submitted by the trustee. To arrive at any date or figure would be a pure guess.

Testimony was offered on behalf of the petitioner to the fact that he was a mere employee working at a defense job and without any means of complying with any turnover order.

Despite the record as to the actual facts, the Referee granted the turnover order relying upon the presumption of continued possession.

Both the District Court and the Circuit Court of Appeals affirmed the doctrine of presumption of continued possession.

In *Seligson* v. *Goldsmith*, 128 F. (2d) 977 (C. C. A. 2), an appeal from an order of the District Court confirming a Referee's order directing the respondent to turnover merchandise, Circuit Judge Learned Hand, who wrote the unanimous opinion of the Court, discussed the question of presumption of continued possession at great length, and stated, at page 978:

> "* * * But a 'turnover' order does not limit itself to finding the bankrupt liable for taking the goods, it must assume in addition to find that he still has control over them and to specify what and how many they are * * *. Yet the finding is in fact seldom, if ever, true in the case of salable goods, particularly when, as generally happens, the order is entered a year or more

> after the theft and at the end of a prolonged hearing. * * * Whatever may be thought of the force of these considerations as demonstrating that the finding is sure to be false at least in part, we cannot conceive how anyone can believe that it is 'supported' by that 'clear and convincing evidence' which must exist to satisfy the test laid down in Oriel *v.* Russell, supra, 278 U. S. 358, 362, 49 S. Ct. 173, 174, 73 L. Ed. 419."

Circuit Judge Learned Hand, in discussing the device employed by the Courts of the presumption of continued possession as being indefensible and unsuitable, at page 979 said:

> "* * * It does not in fact lead to the truth at all, for the bankrupt's mouth is effectively closed to what would nine times out of ten be a good total, or at least a partial, defense; i. e., that he has made away with the goods. But this he cannot say, not because the law forbids, but because if he does, it leads him straight to the prison door. §29, sub. b(1), Bankruptcy Act, 11 U. S. C. A. §52, sub. b(1). However desirable that consummation may be, this fact makes the presumption unsuitable for its only proper purpose of eliciting the facts on whose existence the relief hangs; facts which in this situation the courts know and everyone else knows not to exist."

Judge Hand stated that if the matter were one of first impression, he would not rely upon the presumption and would have reversed the turnover order, stating at page 979:

> "For these reasons, were the matter now before us as res integra, we should reverse the order. It would not disturb us that without the presumption such proceedings would generally fail, except when they were directed against specific articles like books of account. * * * Even if the absence of any other relief were ever an excuse for perverting legal proceedings from their avowed purpose, or for basing relief upon facts

which cannot be known, other relief is here in fact available, for these offenders are extremely vulnerable and can ordinarily be successfully prosecuted, as every judge of experience knows. And though that were not so, it would be at too high a cost that the law should proceed in the face of a basic ignorance which it dares not aver and must cover by a transparent fiction; such abuse of its processes discredits it generally and impairs its integrity, which in the end depends upon an unswerving allegiance to the truth, so far as truth is accessible. Nevertheless, we do not feel justified in overruling a body of authority so nearly uniform, to the building of which we have contributed so largely. The Supreme Court has never committed itself to the presumption, and perhaps at some time may think it desirable finally to determine the question. * * *"

In *Cohen* v. *Jeskowitz*, (C. C. A. 2) 144 F. (2d) 39, the Court again affirmed a turnover order, but in a concurring opinion Circuit Judge Frank, at page 40, stated:

"I concur but with the hope, expressed by Judge Learned Hand in Robbins *v.* Gottbetter, 2 Cir., 134 F. 2d 843, 844, and Seligson *v.* Golfsmith, 2 Cir., 128 F. 2d 977, 978, 979, that the Supreme Court will soon grant certiorari in some such case as this and overrule precedents that fasten upon us what seems to him and me an irrational rule of presumption, obviously contrary to fact, which enables trustees in bankruptcy to employ civil actions as substitutes for criminal proceedings."

In *In re Schoenberg*, 70 F. (2d) 321, the Court held that a trustee who procured a turnover order had to establish what part of the merchandise originally transferred was still on hand, or that the respondent (the petitioner here) had the sum of money which in the alternative he was directed to pay over.

In re Schoenberg, supra, has never been overruled or impugned in any manner by the subsequent decisions by the Circuit Court of Appeals for the Second Circuit.

The views expressed by Circuit Judge Learned Hand and concurred in by Circuit Judges Frank and Swan, appeared to be supported by the principle laid down in the case of *Oriel* v. *Russell*, 278 U. S. 358, where the Supreme Court of the United States held that a proceeding for a turnover order required clear and convincing evidence of the justice of such an order before it is made.

There is a disagreement among the Judges of the United States Circuit Court of Appeals for the Second Circuit on the question of employing the device of presumption of continued possession in turnover proceedings.

It is the considered opinion of Circuit Judges Learned Hand, Jerome N. Frank, and some other colleagues, that the Supreme Court should consider this question and determine it finally, so that such determination may establish the principle of law that the trustee is required to prove the extent of the property which remains in the hands of the respondent in a turnover proceeding at the time that the turnover order is made.

Point B

WHERE THERE IS A CONFLICT OF AUTHORITY ON THE QUESTION OF PRESUMPTION OF CONTINUED POSSESSION AMONG SEVERAL CIRCUITS ON THE QUESTION OF LAW INVOLVED IN THE CASE AT BAR, AND THERE SHOULD BE A UNANIMITY OF OPINION AMONG THE VARIOUS CIRCUITS WITH REGARD TO THIS QUESTION.

Where there is a conflict of authority among the several circuits which involves the liberty of the individual, especially in a case where a man can be incarcerated by way of contempt proceedings for failure to comply with a turnover order, such question should be finally settled by the Supreme Court of the United States.

As the ultimate purpose of a turnover proceeding is to coerce a respondent by the threat of imprisonment by way

of contempt proceedings for failure to comply with the turnover order, so that it is inevitable that the stake of the turnover proceedings is the liberty and freedom of the individual, the Court should make sure that the principles of law invoked in a turnover proceeding are clear and correct and those expounded and upheld by the Supreme Court, and not a principle as to whose validity grave doubts and conflict exists.

As in the decisions cited herein, the Circuit Court of Appeals for the Second Circuit granted turnover orders relying upon the presumption of continued possession.

The Eighth Circuit holds a contrary view. In *Marrin* v. *Ellis* (C. C. A. 8) 15 F. (2d) 321, in discussing the presumption of continued possession, the Court, at page 321 said:

> "The legal presumption is that a bankrupt, who at the time of his adjudication in bankruptcy has and unlawfully holds back from his trustee in bankruptcy a part of his property, or of its proceeds, continues to hold it or them, but this presumption grows weaker as time passes, until it finally ceases to exist."

In this cited case, twenty-seven months were involved between the date of the bankruptcy and the date of the turnover order, and the Circuit Court refused to grant a turnover order on the theory of presumption of continued possession.

In *In re J. L. Marks,* 85 F. (2d) 392, the Circuit Court for the Seventh Circuit in reversing a turnover order granted by the District Court, at page 393, said:

> "We assume for the purpose of the argument that the appellant Marks individually received the $6,500.00. We are not, however, satisfied that the evidence is sufficient to support a finding that he possessed the money either at the time the bankruptcy proceedings were instituted or when the order to turn

> over the money was entered. We therefore conclude that the order was erroneously entered. Oriel v. Russell, 278 U. S. 358, 49 S. Ct. 173, 73 L. Ed. 419."

In *In re Samel* v. *Dodd,* (C. C. A. 5) 142 F. 68, the Court, at page 73, said:

> "The bankrupts, in their answers, have sworn that they have not in their possession or under their control the money or goods involved in this proceeding. It seems to me that any evidence that conclusively showed they presently had in possession and control either the money or the goods would necessarily show where the same was kept or deposited, so that it could be reached by the process of the bankruptcy court, or of some court in a suit by the trustee. But, however that may be, the record in this cause, taken as a whole, fails to show that the bankrupts had in their possession at the date of the order committing them for contempt either the money or the goods referred to. If the bankrupts have sworn falsely in their pleadings or on their examination and this proceeding is based solely on that hypothesis—the law provides for their punishment on indictment and conviction by a procedure which secures to them the right of trial by jury with all its constitutional safeguards."

This case is in accord with reasonings and opinions expressed by Circuit Judges Learned Hand and Jerome Frank, in *Seligson* v. *Goldsmith,* supra, *Robbins* v. *Gottbetter,* supra, and *Cohen* v. *Jeskowitz,* supra.

In In re Fraidin, 55 F. Supp. 129, (D. C. Maryland), Judge Chesnut in denying a turnover order, in refusing to invoke the presumption of continued possession, said at page 130:

> "(1-3) I agree with the referee that the long interval between the date of bankruptcy and the application for the turnover order, under the circumstances of this case, precluded the effective application of the presumption as to continued possession. But apart

from this, dismissal of the turnover order was justified for a different reason. In Oriel v. Russell, Chief Justice Taft said: * * *."

"(5) On the issue of the turnover order it may very well be that the only burden of prima facie proof imposed on the trustee is limited to establishing possession by the bankrupt at the time of bankruptcy, and his failure to turn over the missing goods to the trustee. But where on the trial of such an issue it also appears from the evidence that there is no reasonable probability of the continued possession or control of the missing property or its proceeds by the bankrupt, or in other words that the bankrupt cannot comply with the turnover order, it seems a futile thing to pass an order which (as was said in the Oriel case) is preliminary to a contempt proceeding, when the latter could not properly result in imprisonment for failure of the bankrupt to comply. The findings of the referee with regard to possession in this case are to this effect. And in such a situation it does not seem a proper use of judicial process to pass a turnover order for its possible in terrorem effect only. * * *."

In *In re Tabak* (D. C. E. D. Pennsylvania) 34 F. (2d) 209, the Court pointed out the distinction between a proceeding calling on the bankrupt to account for unaccounted for merchandise, and one calling on the bankrupt to turnover concealed merchandise, which is very appropriate to the case at bar. This case may be one justifying an accounting order but not a turnover order in view of the failure of the trustee to submit any proof as to any property withheld by the bankrupt either at the time of the filing of the petition, or at the time of the institution of the turnover proceedings.

In *In re Goldman* (C. C. A. 1) 62 F. (2d) 421, the Court pointed out that in order to warrant the granting of a turnover order, it should appear that the property was in the possession or under the control of the respondent at the

time of the filing of the petition, which the trustee failed to do in the case at bar.

By reason of the conflict of authority in the various Circuits, and the suggestion of the Judges of the Circuit Court of Appeals for the Second Circuit, this court should assume jurisdiction and determine the question.

Point C

THE TRUSTEE DID NOT OFFER ANY PROOF TO SHOW THAT PETITIONER HAD, AT THE DATE OF THE TURNOVER ORDER, ANY PROPERTY OF THE BANKRUPT, ALTHOUGH THE LAW REQUIRES THAT THE TRUSTEE ESTABLISH ALL THE ELEMENTS OF A TURNOVER PROCEEDING BY CLEAR AND CONVINCING PROOF.

The Referee in the case at bar reached his conclusion solely by invoking the doctrine of presumption of continued possession without regard to the actual fact as to whether the petitioner had the present ability to comply with any turnover order. In fact no proof of any kind was offered by the trustee as to the ability of the petitioner to comply with any turnover order.

All Courts have recognized the serious nature of a turnover proceeding. They are serious in that the respondent, should he fail to comply with the turnover order, as referred to by Chief Justice Taft in *Oriel* v. *Russell*, 278 U. S. 358, may be involved in the predicament of having to go to jail for not doing something which they cannot possibly do.

Even in the Second Circuit the Court has always held that the trustee had the duty of showing present ability to comply on the part of the respondent.

In re Schoenberg, (C. C. A. 2) 70 F. (2d) 321.

In *Epstein* v. *Steinfeld*, (C. C. A. 3) 210 F. 236, 239 (cited with approval in *Oriel* v. *Russell*, 278 U. S. 358, 49 Sup. Ct. 173, 73 L. Ed. 419), the Court said:

> "The second stage is to determine whether or not the property required is still in the possession or control of the bankrupt and that he is physically able to deliver it to his trustee."

In the case at bar no testimony was offered by the trustee in compliance with what is termed "the second stage" of a turnover proceeding. The trustee merely relied upon the presumption of continued possession.

Conclusion

It is therefore respectfully submitted that this case, by reason of the conflict of opinion in the various Circuits, and in view of the opinions and the desires expressed by the Judges of the Circuit Court of Appeals for the Second Circuit, is one calling for the exercise by this Court of its supervisory powers, in order that an important question of Federal law may be settled, and as the questions involved are substantial and novel.

These questions should be finally determined by this Court and a definite determination made with respect to the application of the doctrine of the presumption of continued possession in turnover proceedings.

Wherefore your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, sitting at New York, N. Y., commanding said Court to certify to and to send up to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings by the Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Honorable Court; that the order and decree of the Circuit Court of Appeals for the Second Judicial Circuit be reversed, and that your petitioners

be granted such other and further relief as may seem proper in the premises.

JOSEPH F. MAGGIO,
By DUBERSTEIN & SCHWARTZ, ESQS.,
By SAMUEL C. DUBERSTEIN,
MAX SCHWARTZ,
Counsel to Petitioner.

MAX SCHWARTZ, ESQ.,
SAMUEL C. DUBERSTEIN, ESQ.,
Of Counsel.

(5806)

(3D)

Supreme Court of the United States

OCTOBER TERM, 1944

No. 793

JOSEPH F. MAGGIO,

Petitioner,

vs.

RAYMOND ZEITZ, as Trustee in Bankruptcy of Luma Camera Service, Inc.,

Respondent.

BRIEF ON BEHALF OF TRUSTEE-RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH GLASS,
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Supreme Court of the United States

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BRIEF ON BEHALF OF TRUSTEE-RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petition herein closely parallels the petition in *Jeskowitz* v. *Carter,* No. 658, in which certiorari was denied by this Court on December 11, 1944, and in which a petition for rehearing was denied on January 2, 1945. No reasons are set forth in the present petition to induce a review of the turnover order which were not urged in *Carter* v. *Jeskowitz.* Counsel for the respondent herein was counsel for the respondent in *Carter* v. *Jeskowitz.* No useful purpose would be served by now restating the arguments contained in the respondent's brief in *Carter* v. *Jeskowitz.*

In view of the denial of the petition for a writ of certiorari in *Carter* v. *Jeskowitz,* there would be no occasion for an answering brief herein were it not for certain unwarranted factual arguments contained in the petition. These will be briefly considered.

Petitioner contends that the starting inventory figure used as a basis for determining the shortage was incorrect. Petitioner acknowledges that the same figure appeared in a financial statement issued by the bankrupt and signed by the petitioner. Petitioner complains that he could have denied the correctness of this figure only at the risk of inviting a criminal proceeding against himself and that faced with this dilemma, he was compelled to admit the correctness of the inventory figure.

While it is true that petitioner knows best whether the bankrupt's books and records and the bankrupt's financial statement, which was signed by the appellant, were false, petitioner's present assertion as to the facts is not entitled to any weight. Obviously, even if petitioner had taken the straightforward position of testifying at the hearings that the financial statement signed by him was false, such testimony would not have been conclusive but would have created only an issue of fact. The self-serving assertion that the record and financial statement were false, made at this late date and in such manner as not to bind petitioner if it were ever sought to be used against him, presents no issue.

Petitioner's further argument that the history of the bankrupt's operations makes it "obvious that bankrupt did not have an actual inventory on hand on January 1st, 1941 of $30,889.95" is a *non sequitur*. The bankrupt's inventory as a January 1, 1940 as shown by its records was not so disproportionate with the inventory shown as of January 1, 1941 as to cast any doubt as to the correctness of the latter. In any event, the inventory as of January 1, 1941 instead of being regulated by any laws of mathematics as petitioner seemingly contends, was wholly within petitioner's control.

Petitioner further contends that "almost 3½ years elapsed between the date when the property was claimed to be in the possession of the petitioner and the turnover order by the Referee on August 9th, 1943" (p. 7 of petition). In making this statement, petitioner has assumed that the evidence shows the original taking to have occurred prior to January 1, 1941. At page 4 of the petition, a devious argument is made to establish that the shortage could only have come out of the inventory on hand on January 1, 1941. The argument is based upon the fact that during that year sales exceeded purchases. This fact sheds no light on the date of the actual taking of the missing merchandise by the petitioner. However, there is no need to speculate as to when petitioner abstracted the missing merchandise for, after a thorough review of the evidence, the District Court held (R. 115):

> "It is clear therefore that the merchandise shortage occurred in those two months, November and December, 1941, for which the bankrupt's books were in such poor shape."

The lapse of time in the instant case between the original taking and the commencement of the turnover proceedings was slightly over a year. Less than two years elapsed between the original taking and the making of the turnover order. The corresponding period in *Carter* v. *Jeskowitz*, No. 658, in which certiorari was denied, was 41 months.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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